Sackett and Stitching Together Nonfederal Environmental Law

Therese Wilkerson is a staff attorney at the Environmental Law Institute in the Wetlands Program.

ELI Policy Briefs represent the conclusions of the ELI Research & Policy Division. They first appear in the *Forum* and are later distributed in booklet form to other professionals, key decisionmakers, and the public.

THE current regulatory status of nonfederal waters is, in a word, fractured. With its 2023 decision in *Sackett v. EPA*, the Supreme Court shattered the federal floor of protection for many surface waters across the country. Approximately half of states rely on the federal definition of the Clean Water Act's jurisdictional language, "waters of the United States"—known universally as WOTUS—for their regulatory regimes covering freshwater resources and tidal wetlands, according to ELI Senior Attorney James McElfish's 2022 *Environmental Law Reporter*® article "State Protection of Nonfederal Waters: Turbidity Continues." Now, after *Sackett*, activities occurring in many wetlands and other freshwater resources in states that rely on the federal definition are left unregulated.

The newly established scope of WOTUS departs from nearly fifty years of regulatory definition under the CWA, leaving the status of coverage across the nation fragmented. Most states will need to inventory their existing waters and wetlands programs to determine whether and how to compensate for this historic shift in coverage at a time when, according to the Fish and Wildlife Service, wetlands are rapidly disappearing from the national landscape. However, some states may embrace the post-*Sackett* landscape as an opportunity to engage in the art of repair.

In 1985, the Supreme Court issued the first of several key opinions interpreting the jurisdictional scope of WOTUS. In *United States v. Riverside Bayview Homes,* the Court unanimously held that wetlands adjacent to traditionally navigable waters are within the scope of CWA coverage regardless of whether those wetlands are navigable in fact. Then in 2001, a 5-4 Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* that "an abandoned sand and gravel pit"—located wholly within one state—was not WOTUS merely on the jurisdictional basis that it served as migratory bird habitat. Differentiating between these isolated waters and *Riverside Bayview*'s adjacent wetlands, Justice Rehnquist spoke for the majority in *SWANCC*, saying that "it was the significant nexus between the wetland and 'navigable waters' that informed [the Court's] reading of the CWA."

In 2006, the Court again opined on the scope of jurisdictional waters in a fractured 4-1-4 decision in *Rapanos v. United States.* Justice Scalia, writing for a plurality, stated that: WOTUS includes only "relatively permanent, standing or continuously flowing bodies of water." Further, wetlands are WOTUS when there is a "continuous surface connection" to those relatively permanent, standing, or continuously flowing waterbodies. In his concurring opinion, Justice Kennedy instead found that wetlands and other waters can be jurisdictional under the CWA if they "either alone or in combination with other similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." That is (to reprise Justice Rehnquist's phrase), whether a wetland in question has a "significant nexus" with navigable waters.

Following *Rapanos*, federal courts largely treated Justice Kennedy's significant nexus test as controlling, applying either it, or both his test and Justice Scalia's test. But the poles staked out by these two opinions eventually gave rise to an ineluctable series of rulemakings (and litigation) for subsequent presidential administrations. (For present purposes, the seesaw history of litigation challenging the WOTUS rules promulgated by the Environmental Protection Agency and the Army Corps of Engineer—which we'll refer to hereafter as the agencies—is omitted.)

The Obama administration—attempting to resolve the application of the two different tests—published a final regulation in 2015, the Clean Water Rule, which categorized certain waters as jurisdictional, excluded certain waters, and established categories of waters and wetlands that would require case-specific application of the significant nexus test to determine whether those waters were covered under the CWA. In 2020, as directed by President Trump, the agencies both rescinded the Clean Water Rule and ultimately published a new regulation, the Navigable Waters Protection Rule, which embraced only Justice Scalia's *Rapanos* test. In 2021, as directed by President Biden, the agencies then rescinded the Navigable Waters Protection Rule and published a proposed rule, Revised Definition of Waters of the United States, that revived the 1980s regulatory definitions of WOTUS.

Before the agencies issued the final revised WOTUS Rule, the Supreme Court granted a certiorari petition appealing a Ninth Circuit decision in *Sackett v. EPA.* The question proposed to the Court was simply whether "*Rapanos* [should] be revisited to adopt the plurality's test for wetland jurisdiction

under the [CWA]." Then, in December 2022, the agencies promulgated their final regulations defining WOTUS, which became effective the following January.

In May 2023, the Supreme Court issued what the Natural Resources Defense Council's "Explainer" has described as "the most important water-related Supreme Court decision in a generation." In a 5-4 opinion in *Sackett*, the Court stripped from CWA coverage a large percentage of wetlands that were previously covered as WOTUS. Justice Alito, writing for the majority, held that the CWA's use of the word "waters" means only those relatively permanent bodies of water that are connected to traditional, interstate navigable waters. Following *Sackett,* a jurisdictional wetland must have a "continuous surface connection" to a water that is jurisdictional in its own right, "making it difficult to determine where the water ends, and the wetland begins."

As Justice Kavanaugh observed in his concurrence, this is a sharp departure from decades of regulation and practice, and it has thus been met with mixed reactions. In short, *Sackett* wrests away from the agencies the ability to apply the CWA to many types of ecologically and hydrologically significant waters. Authority over many wetlands previously subject to federal regulation now belongs only to decisionmakers at the state and local levels.

In response, the agencies have published a final direct Conforming Rule, amending now-invalid provisions of the Revised WOTUS Rule to conform to the strictures of *Sackett.* The definition of WOTUS is still not uniformly applied across the country because of ongoing, multi-state litigation over the Revised WOTUS Rule and now the 2023 Conforming Rule. As of this writing, the agencies are implementing the Conforming Rule in 23 states in which the Revised WOTUS Rule has not been preliminarily enjoined by a federal court. For the other 27 states and other parties, the agencies are implementing WOTUS consistent with *Sackett* and the pre-2015 regulatory regime.

As this litigation is pending, states have entered a new regulatory landscape for protection of their freshwater resources and nontidal wetlands. According to McElfish's 2022 article, "Roughly half of states have regulatory schemes for activities in surface waters that are not reliant on scope of WOTUS." While some states regulate some non-WOTUS waters through the permitting of certain point source discharges of pollutants, as stated in McElfish's article, "Nearly half of the states rely on the federal WOTUS definitions and [on Section] 401 [of the CWA] to define the scope of their authority." The extent to which shifting federal coverage of WOTUS affects state-level programs depends, in part, on the degree of state reliance on federal WOTUS definitions and whether the state has supplemental authority to fill in potential gaps in coverage.

Two states have enacted legislation amending the level of coverage afforded to isolated wetlands: North Carolina and Indiana

TWO states have enacted legislation amending the level of coverage afforded to isolated wetlands: North Carolina and Indiana. Following the *SWANCC* decision, North Carolina had been among a small rank of states that had limited regulatory protections of waters to "fill in gaps" of federal coverage. For example, prior to 2023, if the Corps determined that a given isolated wetland did not constitute a WOTUS for purposes of Section 404 CWA jurisdiction, North Carolina state law could conceivably afford protection.

However, after the *Sackett* decision was issued, the North Carolina state legislature swiftly passed a new law, Senate Bill 582 (2023 NC Farm Act), which includes a provision governing the definition of wetlands. Under this bill, "wetlands classified as waters of the state are restricted to waters of the United States as defined by 33 C.F.R. § 328.3 and 40 C.F.R. § 230.3." Though the bill was filed before the Court issued its *Sackett* decision, this legislative change inseparably binds the state regulatory definition of wetlands to the narrowed federal regulatory definition mandated by the *Sackett* Court.

Submitting that the bill's wetland provision "leaves approximately . . . one half of [North Carolina's] wetlands unprotected," Governor Roy Cooper vetoed the bill; however, his veto was overridden by the General Assembly. Cooper then activated a similar policy objective through different means by issuing Executive Order No. 305 earlier this year, which, in part, set goals for state cabinet agencies'

implementation of the strategies articulated in the 2020 North Carolina Nature and Working Lands Action Plan.

The two goals for cabinet agencies under E.O. 305 are, first, to "permanently conserve one million new acres of North Carolina's natural lands, with a special focus on wetlands, as measured by year 2020," and, second, "restore or reforest one million new acres of North Carolina's forests and wetlands, measured by year 2020." Through this order, Cooper directed the state's Department of Environmental Quality, called NCDEQ, to "develop a methodology to update existing wetland mapping data for [the state] that may be employed to estimate the number [of] acres of wetlands that may lose protection as result of *Sackett* and the [2023 NC Farm Act]."

The Tennessee General Assembly is considering a bill that would significantly roll back protections for isolated wetlands

Most notable, perhaps, is E.O. 305's adoption of a common scientific definition of wetlands for purposes of the order, which also plainly states that the definition "does not depend on state or federal law and is intended to be broader in scope than current law." North Carolina's response to *Sackett* may be emblematic of experiences to come for other states with divided governments. In the meantime, NCDEQ will have to navigate headwinds to ensure its actions conform with both the 2023 NC Farm Act and E.O. 305.

Like North Carolina, Indiana developed its isolated wetlands program following the *SWANCC* decision. Under its regulatory and permitting program, Indiana wetlands are categorized as one of three classes, which correspond to levels of regulatory oversight and permitting requirements. However, in 2024, House Bill 1383 was signed into law, amending the statutory provisions that govern the categorization of the state's isolated wetlands.

Class I isolated wetlands have been minimally disturbed or affected by human activity and have minimal habitat and hydrological functions. Class I isolated wetlands have no permitting requirements. Under the new classification, Class II isolated wetlands must meet one of two sets of conditions. One set applies to wetlands that support moderate habitat or hydrological functions but generally do not have the presence of or habitat for rare, threatened, or endangered species. The other set applies to wetlands that satisfy Class III wetland criteria and either support less than minimal wildlife or aquatic habitat or hydrological function, or are minimally disturbed by human activity or development. Class II isolated wetlands require permitting only if the wetland is not more than three-fourths of an acre if located within a municipality or three-eighths of an acre if located outside of a municipality.

Class III wetlands must either be at least one of 14 different "ecologically important [wetland] types" or at least one of six enumerated "rare and ecologically important [wetland] types." To be categorized as Class III under the "rare and ecologically important [wetland] type" criteria, the wetland must also be undisturbed or minimally disturbed by human activity and development and support non-*de minimis* species habitat or hydrological function. Class III wetlands are intended to receive the highest degree of protection from the state.

But, House Bill 1383 has redesignated many Class III wetlands as Class II wetlands. In 2021, those permitting requirements for Class I and Class II wetlands were diminished. Now, in 2024, many of those Class III wetlands will be treated as Class II, resulting in even weaker statewide isolated wetland protection. Though House Bill 1383 does not expressly cite the *Sackett* decision, the bill's changes to Indiana's isolated wetland program may spell out a similar fate: significantly less regulatory oversight for protection of wetlands from development.

WHILE only North Carolina and Indiana have enacted legislation that may weaken water quality protection, other states have advanced proposed legislation with similar aims. Tennessee, for example, was once recognized as part of the cohort of states with fairly comprehensive permitting programs applicable to state waters. However, companion bills have been introduced in 2024 in the General Assembly that would significantly roll back the state's protections for isolated wetlands.

House Bill 1054 and Senate Bill 0631 would amend the state's Water Quality Control Act to prohibit the Tennessee Department of Environment and Conservation from "apply[ing] criteria that will

result in the classification of real property as a wetland, or otherwise regulate real property as a wetland if the real property is not classified and regulated as a wetland under federal law." This amendment, like the 2023 NC Farm Act, would define wetlands as those that essentially have a visible surface connection to bodies of water like rivers and lakes, consistent with *Sackett*. The Tennessee Legislature voted in early 2024 to defer Senate Bill 0631 to a summer study session.

A 2024 bill was introduced in Missouri—a state that does not have a dedicated dredge-and-fill program—that would amend the state's statutory definition of "waters of the state." Senate Bill 981 proposes to add new qualifying language that would limit the enumerated types of state waters (rivers, streams, lakes, and ponds, but not "other bodies of surface and subsurface waters") to mean only waters that are "relatively permanent, standing, or continuously flowing" and are "lying within or forming a part of the boundaries of the state" that are located upon lands leased, owned, or otherwise controlled by two or more persons (except for persons who jointly control the lands or have undivided property interests in the lands).

Despite significant rollbacks, enacted or proposed, some states have signaled conviction to protect surface waters in a post-*Sackett* landscape.

Notably, under Senate Bill 981, "waters of the state [would] include wetlands adjacent to relatively permanent, standing, or continuously flowing bodies of water identified with a continuous surface connection to those waters." Only those subsurface aquifers with surface connections to "relatively permanent, standing, or continuously flowing rivers and streams" would be "waters of the state" under this proposal. If enacted, Senate Bill 981 would remove regulatory coverage for many surface and subsurface waters in Missouri. Among other implications, this bill would deregulate virtually all the state's groundwater—a primary source of drinking water for millions of Missouri residents.

DESPITE significant rollbacks, enacted or proposed, in North Carolina, Indiana, Tennessee, and Missouri, some states have signaled renewed conviction to protect surface waters in a post-*Sackett* landscape. Colorado, for example, has an expansive definition of "waters of the state" that includes wetlands. However, Colorado does not currently have a state permitting program that can immediately protect former WOTUS. Following *Sackett,* the Colorado General Assembly introduced two bills that, despite similar aims to create a state dredge-and-fill permitting program, differed in non-negligible ways.

As of May, the Colorado General Assembly reached agreement on House Bill 24-1379, which repassed through both chambers after amendments were considered. The bill mandates a commission housed under Colorado's Department of Public Health and the Environment—CDPHE—to develop and administer the state dredge-and-fill program, the rules for which must "be at least as protective as the guidelines developed pursuant to [S]ection 404(b)(1) of the [CWA]."

For context, Senate Bill 24-127 would have charged the Colorado Department of Natural Resources—CDNR—to develop and administer a state dredge-and-fill program and develop rules "providing protections for state waters, [that] are no more restrictive than the protections under the [CWA] as [they] existed on May 24, 2023" (i.e., pre-*Sackett)*. In short, the Senate Bill would have prescribed narrower restraints on what the CDNR could regulate through a state-administered dredge-and-fill program.

Under House Bill 24-1379, CDPHE must adopt rules by May 2025 that, among other requirements, establish procedures for issuing authorizations for individuals and for general applications that include public notice and participation requirements. Until CDPHE's final rules become effective, the agency's policy statement CW-17 will stand. CW-17 was published shortly after *Sackett* was issued and encourages entities to disclose their intention to fill small areas of "*Sackett* Gap Waters" and wetlands. The policy provides assurances that the state will not take enforcement action under its general prohibition if the disclosing developer agrees to abide by conditions that would have been applicable under the Corps' nationwide or general permits had the waters remained WOTUS.

This CDPHE policy, though noncomprehensive, provides a way for low-impact projects to self-identify and proceed while the agency develops rules required under House Bill 24-1379. If the bill receives Governor Jared Polis's signature, it will be the first law establishing a state dredge-and-fill program since *Sackett* was issued. The bill may serve as an example of successful bipartisan compromise for

other states seeking to strengthen their water quality protection.

Illinois is among the small rank of states that have limited regulatory coverage of non-WOTUS waters. Following uncertainty about federal protections for isolated wetlands after *SWANCC*, the General Assembly passed the Interagency Wetland Policy Act "to protect these wetlands from state agency action and achieve no net loss of wetlands." The state otherwise substantially relies on its CWA Section 401 certifications, linked to WOTUS, for most purposes.

In 2024, however, the legislature introduced companion bills, Senate Bill 3669 and House Bill 5386 (the Wetlands and Small Streams Protection Act or WSSP), which propose to "restore protections for wetlands and small streams that were formerly protected from pollution and destruction under the [CWA]." As of March 2024, the WSSP has made it out of the respective committees. If enacted, it would establish, among other items, provisions for wetlands delineation and classification; permits and veto authority; a general permitting scheme; appeal processes for agency determinations; and delegated authority for agency investigation and enforcement of pollution violations. Notably, the WSSP would establish a state-level dredge-and-fill permitting regime and an individual permitting regime for activities in certain waters.

When the Court removed swaths of wetlands from federal jurisdiction, it also removed the ability of an injured plaintiff to bring a civil suit against polluters

OUTSIDE of action directly pertaining to state waters and wetlands programs, states might also consider alternative avenues to strengthening components of water quality protection. For example, in April, the Maryland General Assembly passed companion bills, Senate Bill 653 and House Bill 1101 (Clean Water Justice Act), that enshrine a citizen suit provision in state law for violations of Maryland's wetlands and waterways protection laws. Though the CWJA does not amend the extent of coverage of state waters, it will authorize certain persons who meet specific standing requirements to initiate civil actions for violations of Maryland law.

When the *Sackett* Court removed from coverage large swaths of wetlands from federal jurisdiction, it also removed the ability of an injured plaintiff to bring a civil suit under the CWA against polluters of these types of waters. If approved by Governor Wes Moore, the CWJA will mimic the former applicability of the federal citizen suit provision by establishing the public's ability to enforce violations of Maryland's wetlands protection laws.

An alternative approach toward protecting waters and wetlands can be seen in Wisconsin, where voluntary efforts to promote flood resilience—an invaluable ecological service of wetlands—have been incentivized through financial assistance for local government units and organizations applying for a grant on their behalf. The 2023 Wisconsin Act 265 requires the Wisconsin Emergency Management Team to "create and administer a pre-disaster flood resilience grant program." This act establishes two categories of funding: assessment grants to "support the gathering of information on vulnerabilities and identification of flood resilience priorities on a watershed . . . including opportunities to restore wetland, stream, and floodplain hydrology," and implementation grants for hydrologic restoration projects including, but not limited to, programs that remove or reduce wetland drainage. Though far from a strict command-and-control lever, this newly established grant program may help strengthen protection of Wisconsin's wetlands.

The Biden administration, in broad alignment with these forward-thinking objectives, recently announced a "new national goal [among the federal government, states, and tribes] to protect, restore, and reconnect" millions of acres of wetlands, rivers, and streams. Without concerted, restorative efforts, the United States stands to lose indispensable ecological functions of wetlands such as flood protection, climate resilience, and carbon sequestration.

Drawing on fifty years of experience identifying effective legal and practical approaches for wetland conservation, ELI's wetlands law and policy team will be supporting federal, state, tribal, and local governments in efforts to inventory post-*Sackett* coverage of waters and wetlands and to piece together existing nonfederal authorities to preserve these valuable resources.

In a post-*Sackett* landscape, the fabric of protection for surface water lies in tatters. Some states may only be able to observe the state of disarray; others will revel in the unraveling. But some states and local decisionmakers, recognizing their responsibility, may begin to thread the needle and engage in the art of repair. **R&P**